Nos. 93-1456, 93-1828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS *et al.*,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

WINSTON BRYANT, in his official capacity as Attorney General of Arkansas,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE UNITED STATES JUSTICE FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JAMES V. LACY *
LACY AND LACY
30100 Town Center Dr., No. O-269
Laguna Niguel, California 92677
(714) 248-1154
Counsel for Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

No. 93-1456

U.S. TERM LIMITS *et al.*,
Petitioners,
v.
RAY THORNTON, *et al.*,
Respondents.

No. 93-1828

WINSTON BRYANT, in his official capacity as Attorney General of Arkansas,
Petitioner,
v.
BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE UNITED STATES JUSTICE FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the United States Justice Foundation, a California corporation (the "USJF") submits the following brief *amicus curiae* in support of Petitioners in this action. Written consent to the filing of this brief has been granted by counsel for Petitioners and

Respondents in each consolidated case and such written consents of all parties have been lodged with the Clerk of this Court.

The USJF is a non-profit, tax-exempt California corporation dedicated to the preservation of property, civil and human rights. USJF regularly represents individuals and classes, not only to redress individual acts of injustice, but also to promote important public policy matters. USJF has been active in a variety of issues since it was founded in 1979, including significant developments in the law in the fields of tax limitation and welfare reform. During the Supreme Court's October term, 1991, USJF filed a Motion for Permission to File Brief as Amici Curiae and Brief in Support of Respondents in *Nordlinger v. Hahn,* 112 S.Ct. 2326 (1992), the case in which this honorable Court resolved the constitutionality of the California system of real property taxation.

California enacted a Congressional term limits law, Proposition 164, through the initiative process in 1992. Besides having supporters in Arkansas, USJF has many members, directors and supporters who live and vote in California. Since issues raised in the cases at hand may relate directly to the constitutionality of Proposition 164, USJF has a particular interest in presenting its position in support of Petitioners through this brief *amicus curiae*.

SUMMARY OF ARGUMENT

USJF submits that the Arkansas Supreme Court failed to fully consider the factual and legal implications of the availability of the write-in option for "barred incumbents" seeking re-election to Federal office. If such implications were considered, that Court should have found that "barred incumbents" were not absolutely barred from running for re-election to Federal office. That Court also should have considered Amendment 73's constitutionality as a regulation of the "manner" of elections under Article 1, § 4 of the United States Constitution. If the Court had considered Amendment 73 as a regulation of the

manner of elections, the appropriate constitutional test to apply to the state regulation would have been the rational basis test. The Arkansas Supreme Court received ample evidence to make a determination that the policy behind Amendment 73 has a rational basis, and to find the law as not unconstitutional. In failing to so rule, the Arkansas Supreme Court erred, and should be reversed, and Amendment 73 should be found as not unconstitutional.

I. AMENDMENT 73 DOES NOT VIOLATE THE QUALIFICATIONS CLAUSE OF THE CONSTITUTION.

A. Amendment 73 Is Not an Absolute Bar to the Re-Election of a Long-Term Congressman or Senator.

The Arkansas Supreme Court determined that Amendment 73, a measure directly enacted by the voters of Arkansas, imposed a restriction on a category of candidate's eligibility for a "printed" appearance on a ballot for election to the United States Congress, and that as a result of this restriction a "broad category of persons" was excluded from seeking election to Congress in violation of the Qualification clauses of Article 1, §§ 2 and 3 of the United States Constitution. The Court heard Petitioner's argument that the exclusion was a permissible exercise by the state of the regulatory power of organizing elections pursuant to Article 1 § 4 of the Constitution, and stated,

> ". . . we do not agree, however, that excluding a broad category of persons from seeking election to Congress is a mere regulatory power." *U.S. Term Limits v. Hill,* 316 Ark. 251, 266.

The Supreme Court of Arkansas erred in overstating Amendment 73's reach and underestimating the legal and factual significance of the option available to long-term former and incumbent politicians in Arkansas to be re-elected to Federal office by write-in.

First, the "broad category of persons" seeking election referenced by the Court merits a closer examination. On

the facts, the category of persons identified in Amendment 73 who would be affected by the law is limited to incumbent politicians in Arkansas seeking re-election to the House of Representatives (having served six years) and the Senate (having served twelve years), as well as former office holders who, having reached the relative levels of service, wish to run once again for Federal office.

In any two-year election cycle, there may or may not be a Senate election in Arkansas, given the staggering of elections of Arkansas' two Senators. One of the Senate seats will be up for election in 1998. *Congressional Quarterly's Members, 103rd Congress, Senate.* Arkansas has a total of four members of the House of Representatives. *Congressional Quarterly's Members, 103rd Congress, House of Representatives.* In 1998, for example, if each of these four Congressmen have reached their term limit for purposes of printed ballot status, and *assuming* each of these four, along with the incumbent Senator, will seek re-election, the "broad category of persons . . . seeking election" as referenced by the Court would be a total of five people. This number could of course increase if one or more of Arkansas' retired Members of Congress with the requisite service also decided to seek reelection. Given these facts, it appears that five people may be affected by the law in 1998. Thus, measured by another yardstick, the category is not so broad as stated by the Court.

Perhaps the Arkansas Supreme Court was considering the effect of legislation such as Amendment 73 if implemented by each state or on a national level. In that case, many more incumbent politicans would indeed be affected. While such information is not relevant to the Court's review of the Arkansas law, the national statistics may provide some context for the Arkansas Supreme Court's reference to a "broad category of persons." According to information developed by the Congressional Accountabil-

ity Project ("C.A.P.") of Public Citizen from the publication *Vital Statistics on Congress, 1993-1994*, a joint publication of the Congressional Quarterly and the American Enterprise Institute, pages 20-21, the length of service among the 435 members of the House of Representatives in the current Congress is as follows:

First term:	110
Two terms:	39
Three terms:	38
More than three terms:	248
Total:	435

The mean term of office developed from the statistics was 5.3 years. The median term of office developed from the statistics was 4 years.

As to the Senate, the C.A.P. calculations are as follows:

First term:	30
Two terms:	17
More than two terms:	53
Total:	100

The mean term of office developed from the statistics was 11.3 years. The median term of office developed from the statistics was 12 years.

If applied on a national level, the Arkansas law would have an affect on slightly over half of the compositions of both Houses of Congress. In addition, the respective limits on length of service indicated in Amendment 73 appear consistent with the mean and median lengths of service in the current Congress as calculated by the Congressional Accountability Project. However, the Arkansas law is not intended to apply nationally, and in 1998, the "broad category of persons" it will affect will probably be no more than five people.

But even accepting that this category of politician will be excluded from the printed ballot by Amendment 73, it remains that such persons still have the opportunity to win re-election to Congress by running as a write-in can-

didate consistent with Arkansas law. The Arkansas Supreme Court made a passing reference to the availability of the write-in:

> "This effort to dress eligibility to stand for Congress in ballot access clothing, that is, as a regulatory measure falling within the State's ambit under Article 1, § 4, is not without some rational appeal. We do not agree, however, that excluding a broad category of persons from seeking election to Congress is a mere exercise of regulatory power. The intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service. We do recognize that an ineligible congressman under Amendment 73 is not totally disqualified and might run as a write-in candidate for Congress or receive a gubernatorial appointment to fill a vacancy in the same body. Following this thread, the appellants posit that term limitations do not mean disqualification—only ineligibility to be placed on the ballot as a candidate for certain offices. These glimmers of opportunity for those disqualified, though, are faint indeed—so faint in our judgment that they cannot salvage Amendment 73 from constitutional attack. *See Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994)." *U.S. Term Limits v. Hill*, 316 Ark. 251, 266.

USJF asserts that the Court's dismissal of the legal and factual implications of the availability of the write-in option in citing to *Thorsted v. Gregorie,* is in error.

The District Court in *Thorsted* did consider the availability of a write-in option in connection with its review of a somewhat similar Washington state term limits law, Initiative 573. (Wash. Rev. Code § 29.68). *Thorsted v. Gregoire,* 841 F.Supp. at 1078. The *Thorsted* court characterized the write-in option in that case as a "pinhole of opportunity." *Id.* Despite the similarities between the Arkansas and Washington state term limit proposals, a significant difference between the two states is the fact

that under Washington state law "Initiative 573 makes incumbents with the specified length of service 'ineligible to appear on the ballot *or file a declaration of candidacy.*'" (*Emphasis added*). *Thorsted v. Gregorie,* 841 F. Supp. at 1079. The *Thorsted* Court concluded that ineligibility to file a declaration of candidacy would disqualify write-in votes for candidates also barred from the printed ballot, because of a statute in Washington which requires that "One who seeks to be write-in candidate may file a declaration of candidacy not later than the day before the election." *Id.* (Wash. Rev. Code § 29.04.180). The Court stated that "*The measure will thus keep barred incumbents off the ballot no matter what they do.*" *Thorsted v. Gregoire,* 841 F. Supp. at 1079. (*Emphasis added*).

Almost in disregard of its own conclusion of law, the *Thorsted* court then went on to discuss its dissatisfaction with the write-in option, as if it were available, and concluded that the option alone was unconstitutional because the District Court thought it was harder to win election to Congress by write-in:

> "Denial of ballot access ordinarily means unelectability. The State concedes that no one in its history has been elected to Congress by a write-in vote. The record shows that in the country as a whole only three candidates for the House have been elected by write-in votes since 1958, and only one candidate for the Senate has been elected by that method since 1954. The Initiative would thus have the practical effect of imposing a new qualification: non-incumbency beyond the specified periods. The intended and probable result would be the same as if the State were to adopt non-incumbency as an absolute requirement." *Thorsted v. Gregoire*, 841 F. Supp. at 1081.

The Arkansas Supreme Court made a startling mistake in citing to *Thorsted,* because, unlike the facts in *Thorsted,* no restriction on the eligibility for the write-in ballot is present in Amendment 73 or otherwise plead regarding

the law of the State of Arkansas. "Barred incumbents" or former office holders who have met the required service can use the write-in option as a method to obtain re-election in Arkansas, and the Arkansas Supreme Court failed to give proper consideration to this important distinguishing factor.

Further, the *Thorsted* court's gloomy dicta in consideration of the hypothetical possibilities of election to Congress by write-in, coupled with the Arkansas Supreme Court's reference to the faint "glimmers of opportunity" presented to candidates by this option, confuses law with politics. Congressman Ron Packard is an example of a current Member of Congress who did win a write-in election:

> "No matter how long Packard serves in Congress, nothing in his electoral career is likely to match the tumult of the contest that brought him to Congress and made him one of the few members ever elected as a write-in candidate.
>
> When GOP Rep. Clair W. Burgener announced his retirement in 1982, Packard and 17 other Republicans filed for the primary. Packard, a veteran of Carlsbad city politics, emerged as a front-runner. But he found himself in a pitched battle with recreational vehicle tycoon Johnnie Crean.
>
> A political neophyte, Crean sank close to $1 million into his bid, which consisted largely of personal attacks on his rivals, some wildly inaccurate. Afterward, Crean blamed his campaign's conduct on his consultants, whom he fired the day after the primary. Crean earned the abiding scorn of many Republicans but won the nomination over Packard by 92 votes.
>
> Many GOP partisans were unhappy with the outcome, and they helped persuade Packard to enter the general election as a write-in candidate. Crean tried to mend fences and reform his image. He argued that Republicans choosing Packard would split

> the GOP vote, electing the Democratic nominee, Roy Pat Archer, a professor of government. Party officials came out for Crean, and Packard's funding dried up.
>
> But Packard was still strong at the grass-roots level. While press coverage kept the Crean controversy fresh, Packard sent out 350,000 pieces of mail proclaiming himself the legitimate GOP alternative. On Election Day, his poll workers handed out pencils with Packard's name, urging their use. Packard edged Archer by 8,000 votes. Crean ran third.
>
> Packard has not been seriously challenged since and most recently won re-election by a 2-1 ratio." *Congressional Quarterly's Members, 103rd Congress, House of Representatives.*

The reality is that, although it hasn't happened often in the history of Congressional elections, candidates have indeed been elected to Congress by the write-in ballot. In the case of Ron Packard, 66,441 write-in voters, to be exact, gave him 37% of the total vote (*id.*) and a commanding victory over the official nominees of the Republican and Democratic party, whose names were printed on the ballot. The District Court in *Thorsted* failed to recognize that electability or "unelectability" is more a function of *political* factors than it is a question of legal analysis. "Electability" or "unelectability" is a *political* matter that should not be the determining factor in the review of Amendment 73's constitutionality, where ballot access for a long-term incumbent or former office-holders is otherwise available through a write-in candidacy.

Long-term incumbent politicians have natural advantages over challengers that are made manifestly clear in the preamble to Amendment 73. Such natural advantages of incumbency include high name identification, prestige of office, and usually an advantage in fundraising to finance an effective campaign. The expressions of

opinion articulated by the Arkansas Supreme Court and *Thorsted* Court about the perceived difficulties of "barred incumbent" candidates to mount formidable re-election campaigns as write-ins should be recognized as utter speculation on the part of those Courts.

Finally, in deciding *Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274 (1974), the Supreme Court concluded that a law which barred certain candidates for the House of Representatives from the ballot in California was not unconstitutional. In a footnote, this Court stated, "Moreover, we note that the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative provided by California law, see §§ 18600-18603 (Supp.1974)." *Storer v. Brown,* 415 U.S. at 736.

The write-in option available in Arkansas consistent with Amendment 73 is more than a meaningless or faint option. A Member of the House of Representatives who has served six years, or a member of the Senate who has served twelve years, and now wishes to seek re-election, has a real opportunity to do so, even though such candidates would be barred from the printed ballot under Amendment 73.

B. Amendment 73 Is Consistent With Decisions Upholding State Regulation of the Time, Place and Manner of Congressional Elections.

While recognizing a candidate does not have a fundamental right to candidacy requiring close scrutiny (*U.S. Term Limits v. Hill,* 316 Ark. 251, 271, *citing to Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 3 L.Ed.2d 92 (1972); and *Clements v. Fashing,* 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) (plurality decision)), and that states have more than mere regulatory powers in determining a similar term limit provision covering state legislative and executive offices was constitutionally permissible (*U.S. Term Limits v. Hill,* 316 Ark. at 271), the Arkansas Supreme Court nevertheless invalidated the pro-

visions of Amendment 73. In this regard, the Arkansas Supreme Court failed to recognize the ballot access available to "barred incumbents," and failed to apply the same standard that it employed in reviewing the constitutionality of the term limits provisions for state elected officals.

The Arkansas Supreme Court also failed to recognize the *Storer* Court's observation that "States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, *with respect to both federal and state elections,* the time, place, and manner of holding primary and general elections, the registration and qualification of voters, *and the selection and qualification of candidates. Storer v. Brown,* 415 U.S. at 730. (*Emphasis added*).

Had the Arkansas Supreme Court recognized that "barred incumbents" for Federal office have an avenue to election, it should have found Amendment 73 as an otherwise permissible regulation of the manner of elections under Article 1 § 4 of the United States Constitution. In this context, the appropriate analysis should have been whether the state had a rational basis to justify the ballot restriction.

II. THE APPROPRIATE STANDARD OF REVIEW IS THE RATIONAL BASIS TEST.

The test of the constitutionality of an otherwise permissible state election regulation, as articulated in *Storer,* is a consideration of "the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification." *Storer v. Brown,* 415 U.S. at 730, *citing to Williams v. Rhodes,* 393 U.S. 23 at 30 (1968) and *Dunn v. Blumstein,* 405 U.S. 330 at 355 (1972).

In considering the policy behind Amendment 73, the Arkansas Supreme Court reviewed its preamble:

> "The people of Arkansas find and declare that elected officials who remain in office too long become

> preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials." (*id.*, 256.)

The Court then considered the standard of review applicable to the state elected officials:

> "However, not every burden on the right to vote is subject to strict scrutiny or requires a compelling state interest to justify it." (*id.*, 271.)

The California Supreme Court considered the effect of a constitutional amendment fixing term limits on elected state officials. *Legislature of the State of California v. Eu*, 54 Cal.3d 492, 286 Cal.Rptr. 283, 816 P.2d 1309 (1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1292, 117 L.Ed.2d 516 (1992). The stated policy behind the California amendment, which like Amendment 73 was also adopted by the voters as a ballot proposition, is as follows:

> "The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative. The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent. To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited." (Article IV, § 1.5, California Constitution.)

The California Supreme Court considered the interests of the voters and supporters of certain candidates against the will of the electorate limiting incumbent terms and held that the amendment would prevail irrespective of whether a rational basis standard or a compelling state interest standard was employed. The *Eu* Court stated: "In sum, it would be anomalous to hold that a statewide initiative measure aimed at "restor[ing] a free and democratic system of fair elections," and "encourag[ing] qualified candidates to seek public office" (Cal. Const., art. IV, § 1.5), "is invalid as an unwarranted infringement of the rights to vote and to seek public office." *Legislature of the State of California v. Eu*, 816 P.2d at 1829.

Ample evidence was presented in the current case to allow the court to draw a conclusion that long-term incumbency by Federal elected officials is a detriment, rather than an enhancement, to government. The preamble to Amendment 73 adequately expresses a state policy upon which this Court may conclude that the restriction as applied to the small class of "barred incumbents" has a rational basis, and is therefore not unconstitutional. In failing to weigh the interests of the state against the interests of incumbent politicians, and in failing to consider the interests of Arkansas voters in Federal elections similarly to the interests of those same voters in state elections, the Arkansas Supreme Court erred.

In 1992 voters in California adopted Proposition 164, the California congressional term limits law. Ca. Elec. § 25003. The California law permits write-in candidacies of otherwise "barred incumbents." Ca. Elec. § 25003.(b).

The policy behind the California law is in many respects similar to that found in Amendment 73:

> "(a) Federal officeholders who remain in office for extended periods of time become preoccupied with their own reelection and for that reason devote more effort to campaigning for their office than making legislative decisions for the benefit of the People of California.
>
> (b) Federal officeholders have become too closely aligned with the special interest groups who provide contributions and support their reelection campaigns, give them special favors, and lobby the House of Representatives and Senate for special interest legislation, all of which can create corruption or the appearance of corruption of the legislative system.
>
> (c) Entrenched incumbency has discouraged qualified citizens from seeking office and has led to a lack of competitiveness and a decline in robust debate on issues of importance to the People of California.
>
> (d) Due to the appearance of corruption and the lack of competition for the legislative seats held by entrenched incumbents, there has been a reduction in voter participation which is counter-productive in a representative democracy.
>
> (e) The citizens of this state have a compelling interest in preventing corruption and the appearance of corruption by LIMITING [sic] the number of TERMS [sic] which any Senator or Representative representing the People of this state may serve.
>
> (f) The citizens of this state have a compelling interest in preserving the integrity of the ballot by promoting competitive elections and LIMITING [sic] the influence of special interests upon entrenched incumbent legislators.
>
> (g) The citizens of this state have a compelling interest in voting for the candidate and candidates

> of their choice, and in standing for and holding elective office, and in preventing the perpetual monopolization of elective offices by incumbents.
>
> (h) The citizens of this state have a compelling interest in extending the equal protection of the laws by ensuring that more of the People of this state have an equal opportunity to stand for and hold elective office." § 2, Findings and Declarations, (a) through (h), Proposition 164, 1992.

Voters in California, Arkansas, and many other states have provided strong support to the idea that long-term incumbency is detrimental to the democratic system. USJF urges this honorable Court to consider the point raised by Petitioners, that the "term limits movement . . . is the most significant grassroots political phenomenon of recent years."[1]

However, restrictions on incumbency are nothing new in the history of Republican government. The ancient Roman Republic was presided over for almost five hundred years by a pair of annually elected officials who were known as consuls,[2] and who by law could not stand for re-election until a fixed time had passed.[3] Term limits have been required of Federal executive branch officials for many years, and a growing number of states are adopting term limit provisions not only for their executive branch officials, but also for their state legislators. It is now time for the U.S. Supreme Court to respect the wishes of the citizens of Arkansas and limit the terms of its Members of Congress by upholding the constitutionality of Amendment 73.

---

[1] *See* Petitioner U.S. Term Limits "Petition for a Writ of Certiorari," No. 93-1456, Supreme Court of the United States, October Term, 1993, p. 8.

[2] *See* generally, *The Founders of the Western World*, by Michael Grant, Scribners, 1991, p. 148.

[3] *Fall of the Roman Republic*, [Life of Gaius Marius, paragraph 12], Plutarch, Penguin Classics, 1972, p. 24.

CONCLUSION

For the foregoing reasons, this Court should grant petitioner's claim and find that Amendment 73 is not unconstitutional.

Respectfully submitted,

JAMES V. LACY *
LACY AND LACY
30100 Town Center Dr., No. O-269
Laguna Niguel, California 92677
(714) 248-1154
Counsel for Amicus Curiae

Dated: August 16, 1994 * Counsel of Record